

No. 48636-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

V.

KEITH RATLIFF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge
The Honorable James J. Dixon, Judge
Cause No. 15-1-00848-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion when it denied Ratliff's motion to represent himself at trial.

2. Whether the prosecutor engaged in misconduct during closing argument.

3. Whether this court should deny appellate costs should the State substantially prevail on appeal.

B. STATEMENT OF THE CASE.

The State accepts Ratliff's Statement of the Case, with the following additions.

On November 16, 2015, a hearing was held in Ratliff's case. The prosecutor noted that an agreed order of competency had been entered on November 9, 2015. 11/16/15 RP 4. Since then the parties had been attempting to get a trial date set, but for unknown reasons the matter failed to appear on the calendar and Ratliff had not been brought from the jail to court. Ratliff had consistently refused to appear by video. Id. at 4-5. Ratliff was present for this hearing. Id. at 5.

Ratliff's counsel proposed a trial date of January 4, 2016. Using profanity, Ratliff expressed an opinion that the speedy trial period had run, and when asked to sign a trial setting order, Ratliff

said, “I want you off my f***ing case,” and spat on his attorney. Id. at 7. Ratliff was removed from the courtroom. Id.

Following the defendant’s departure from the courtroom, the court and the parties made a record that five corrections deputies had removed Ratliff after he spat on his attorney. Id. Defense counsel made an oral motion to withdraw, which was granted. Id. at 9. The court ordered that the Office of Assigned Counsel appoint another attorney to represent Ratliff. It also observed that before being removed, Ratliff had made, off the record, several vulgar and threatening comments directed at his counsel. Id. at 9-10. The prosecutor advised, and the court corroborated, that she had heard Ratliff specifically threaten to kill his counsel if he were not removed from Ratliff’s case. Id. at 10.

The court then indicated that its intent was that future hearings be conducted by video to avoid bringing Ratliff to court “so as not to endanger other people.” Id. at 11.

C. ARGUMENT.

1. A trial court cannot allow a defendant to waive the right to counsel unless such a waiver is knowing and voluntary. Without conducting a colloquy, the court has no way of determining voluntariness of the waiver. Because Ratliff refused to engage in the colloquy, he forfeited his right to represent himself.

A defendant in a criminal case has a constitutional right to waive the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). The right is not absolute; the presumption is against waiver. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The request must be made knowingly and intelligently. A defendant may not, by representing himself, disrupt a trial or other hearing and he must comply with procedural rules and substantive law. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

A court's decision to grant or deny a motion to proceed pro se is reviewed for abuse of discretion. The degree of discretion to be exercised in regard to timeliness varies with the time span between the motion and the trial. The more time there is between the motion to represent oneself and the trial, the less discretion the court has to deny it. Id. at 106-07. A court abuses its discretion when its decision is "manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Madsen, 168 Wn.2d at 504 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

When the trial court is made aware that the defendant wishes to represent himself but delays ruling on the motion, the timeliness of the motion is measured as of the date of the first request. Madsen, 168 Wn.2d at 508. A request to represent oneself must be unequivocal, a knowing and intelligent relinquishment of the right to counsel. Faretta, 422 U.S. at 835. The defendant must be made aware of the dangers of representing himself, but there is no requirement that he have any legal knowledge or skills. Id.

The State does not dispute that Ratliff made a timely motion to proceed pro se. The right to represent himself cannot be denied because a defendant is obnoxious. Madsen, 168 Wn.2d at 509. However, the trial court must be persuaded that the waiver of counsel is knowing, voluntary, and intelligent, and the record “must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of the technical procedural rules governing the presentation of his defense.” State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The way to determine that the defendant understands the risks involved of waiving counsel is to have a colloquy between the judge and defendant on the record. Madsen, 168 Wn.2d at 511-12,

Fairhurst, J., concurring; State v. Vermillion, 112 Wn. App. 844, 857-58, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022, 66 P.3d 638 (2003). “A court’s failure to engage in a colloquy would not be error if the court attempted to engage in one and that attempt was thwarted by the defendant.” Madsen, 168 Wn.2d at 513.

It was not clear from the record that Ratliff understood the risks of representing himself. He consistently wanted priority access to the jail law library, and saw pro se representation as the method to achieve that. *E.g.*, 07/14/15 RP 7-8; 12/17/15 RP 7; 12/30/15 RP 4; 01/05/16 RP 13. There is no indication he understood that he would also have to conduct his defense at trial without assistance. The court was willing to hear the motion, set aside three hours to hear it, and attempted to conduct a colloquy with Ratliff on December 30, 2015, but Ratliff refused to participate. 12/30/15 RP 12. It cannot be said that the trial court was unreasonable in requiring that this hearing be conducted by video. In the hearing on November 16, 2015, Ratliff had not only been disruptive and obnoxious, but had assaulted his attorney.

Ratliff argues, however, that his “fundamental right” to represent himself is so important that the trial court should have

allowed him to present his motion in person in the courtroom. Appellant's Opening Brief at 12. He does not cite to any authority for that proposition. The right to self-representation exists side-by-side with the right to be represented by counsel; to exercise one right a defendant must waive the other. "It is therefore out of caution that the law requires courts to "indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel." Madsen, 168 Wn.2d 496, 511, 229 P.3d 714 (2010), *quoting In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999), *in turn quoting Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

"A trial court has wide discretion in determining the appropriate means to deal with a defendant's disruptive courtroom behavior." State v. Thompson, 190 Wn. App. 838, 843-44, 360 P.3d 988 (2015), *review denied*, 185 Wn.2d 1012, 367 P.3d 1083 (2016); *see also*, State v. Chapple, 145 Wn.2d 310, 322, 36 P.3d 1025(2001) ("Since the trial judge bears the responsibility for maintaining order and the appellate court is limited to reviewing a cold report, we give substantial deference to the trial judge's decisions about courtroom management.")

The trial court was not required to subject the other people in the courtroom to Ratliff's outrageous behavior in order to conduct the necessary colloquy regarding waiver of the right to counsel. Unlike the trial, where his presence in the courtroom before the jury was important to his ability to present his defense, appearing by video would have accomplished the same result as being in the courtroom. But it is clear from the entire record that Ratliff wanted to be in charge—of the jail, the courtroom, his attorney, the judge, the trial—indeed, every aspect of his prosecution. There is no authority for the proposition that the court must turn over control to the defendant.

In Tacoma v. Bishop, 82 Wn. App. 850, 920 P.2d 214 (1996), the court addressed the mirror image of the issue in this case. Bishop was tentatively appointed counsel and instructed to contact the Department of Assigned Counsel (DAC) to determine his eligibility and obtain representation. Id. at 853. Bishop failed to do so. Trial was continued because he did not have counsel. At the second trial date, a little more than five months after the date he was appointed counsel, Bishop asked for another continuance because he had not contacted DAC. The court denied the continuance and Bishop represented himself at trial. Id. at 853-54.

He was convicted, but the Court of Appeals reversed because, although a defendant may waive his right to counsel by his inaction, such waiver must be intelligent, that is, the court must have advised him of the risks of proceeding pro se. Id. at 855, 864.

The court in Bishop, citing to a Third Circuit Court of Appeals case, discussed waiver, forfeiture, and waiver by conduct. Bishop, 82 Wn. App. at 858-59. Waiver is an “intentional and voluntary relinquishment of a known right.” Id. at 858. Forfeiture “results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right.” Id. at 858-59. Waiver by conduct is a “hybrid situation” where a defendant, who has been warned about the consequences of his actions and the risks of representing himself, continues to engage in misconduct. His conduct may be treated as a waiver of the right to counsel. Id. at 859.

Applying those principles to Ratliff’s case, it is apparent that he was never warned about the risks of representing himself, wholly because he refused to engage in a colloquy with the court. He did, in effect, forfeit his right to proceed pro se because of his own behavior.

It would have been error for the court to allow Ratliff to represent himself without advising him of the risks of doing so and determining that he was giving up the important right to counsel knowingly and voluntarily. Under the circumstances of this case, the court did not abuse its discretion in refusing to allow him to proceed pro se. By the morning of trial, even if the court had been able to conduct the required colloquy, it was too late. The trial was ready to begin. There was no error.

2. The prosecutor did not make any improper arguments during closing. There was no misconduct and no prejudice.

Ratliff claims that the prosecutor committed misconduct by arguing that Ratliff's testimony that he did not know what was in the baggie containing meth, and never saw the baggie containing the two half-pills, was not reasonable. He maintains that the prosecutor relied on speculation about how the homeless population behaves and that the argument was inflammatory and prejudicial. Ratliff did not object during either the State's initial closing or rebuttal arguments, although he did interject his own argument so many times that the court called a recess and admonished him. 01/06/16 RP 236-37.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85.

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Russell, 125 Wn.2d at 87. See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). "When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007)

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

It is the duty of the prosecutor to seek a verdict based on the evidence in the case rather than appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). It is misconduct for a prosecutor to appeal to the jurors' fear of criminals or invoke racial, ethnic, or religious prejudice as a reason for to convict. Belgarde, 110 Wn.2d at 504. Similarly prohibited are "inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism." State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); see also State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). While in closing argument the prosecutor has

wide latitude to draw reasonable inferences from the evidence, a prosecutor may not suggest that evidence not presented provides additional grounds for convicting the defendant. Russell, 125 Wn.2d at 87(citing United States v. Garza, 608 F.2d 659 (5th Cir. 1979)).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a “substantial likelihood” that the jury was affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The concern is less with what was said or done than with the effect likely to result from what was said or done.

Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?”

State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012), quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

a. Inferences are not the same as speculation.

Ratliff's complains that the "prosecutor relied on speculation and bias about the homeless population to discredit" his testimony. Appellant's Opening Brief at 16. The prosecutor argued that Ratliff, having lived on the streets for most of his life, would be aware of the prevalent drug culture and would be aware of the nature of the items he claimed to have found in a donated jacket pocket. 01/06/16 RP 230-31, 235-36. The prosecutor asked the jury to rely on its common sense and experience. Id. at 232.

Ratliff testified that he was wearing a woman's jacket that had been given him by a stranger. 01/05/16 RP 140, 154-55. He looked in the pockets and found the one-by-one-inch baggie but did not know what it was; he also said it was empty. He said he did not see the baggie containing the two half pills. 01/05/16 RP 141-42, 155-56. Ratliff said he had lived on the street all of his life and was familiar with the street environment. 01/05/16 RP 160, 173.

In its rebuttal case, the State elicited testimony from Olympia Police Officer Paul Frailey, who said that he was familiar with the

homeless culture in downtown Olympia, and that drugs were a significant part of that culture. 01/05/16 RP 181-88. He testified that the one-by-one-inch baggies, called scraper bags, are extremely common, as were half-tablets of drugs. *Id.*

Ratliff confuses an appeal to common sense and reasonableness with an appeal to passion and prejudice. He cites to State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012), a murder case in which the prosecutor argued in the first person, attributing “repugnant and amoral thoughts” to the defendant. *Id.* at 554. He also gave the jury an “emotionally charged,” “fabricated and inflammatory account” of the murders. *Id.* at 555. Ratliff also cites to State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), in which the prosecutor not only gave a racially offensive closing argument but injected racial bias into the questioning of many of the witnesses.

Those cases are a world apart from what happened in Ratliff's trial. The prosecutor began her argument by referring to Instruction No. 5, CP 141, and telling the jury it was expected to use its common sense. 01/05/16 RP 219-20. Further on in the argument she said:

We don't make decisions in cases based on sympathy or prejudice or personal preference. Those are not part of the common experience that you should be injecting into that conversation. It's based on the facts and we know about reasonable human behavior (sic). . . . Being homeless is not a crime. There's absolutely nothing wrong with being homeless.

Id. at 227

You should consider his history and that 40 or 60 years . . . in terms of his knowledge and his experience and whether or not those statements he was making to you are reasonable. That's the only reason you should be considering that background or history. It shouldn't play into your decision making in any other way. Because he's not doing anything wrong by being homeless in downtown Olympia. There's nothing wrong with that. But the choices you make in terms of possessing controlled substances is illegal. And whether or not he has knowledge of that, whether it's there or he knows what it is, that criminal—or that history comes into play. That homeless history comes into play. So you need to consider his testimony in light of that knowledge and experience.

Id. at 228.

The prosecutor then examined Ratliff's explanation for possessing the controlled substance and repeatedly asked the jury to consider whether that explanation seemed reasonable. 01/06/16 RP 229-336. During the defense closing argument, counsel argued that there was no direct evidence that Ratliff knew the controlled substances were in his possession. 01/06/16 RP 244-49.

On rebuttal, the prosecutor again returned to her theme that Ratliff's explanation was not reasonable. 01/06/16 RP 250-53. Not once in either her direct closing argument or rebuttal did she attempt to denigrate homeless people or encourage the jury to find Ratliff guilty because he was homeless. Her argument centered on the nature of the homeless culture, of which Ratliff rather proudly admitted to being a part, and the unreasonableness of Ratliff's unwitting possession defense in light of that culture. Officer Frailey testified about that culture, and the prosecutor drew on that evidence to make her argument. It was not speculation. Rather, she made realistic inferences from the evidence to argue that Ratliff's explanation was unreasonable.

Ratliff argues that the prosecutor's statement that the '70s through the '90s were the heyday of drugs in the homeless population is unsupported by evidence admitted at trial, and that is true. Appellant's Opening Brief at 16. However, the jurors were all adults, and it can be assumed that adult residents of Thurston County would have at least passing acquaintance with the general history of the area. Jurors are instructed to apply their common sense and experience. CP 141. Counsel for either side should be able to place events in context of the common knowledge of the

jurors without having to prove every aspect of that common knowledge. For example, counsel could refer to some event that occurred before the Obama presidency without having to offer evidence of the year President Obama was elected.

There was no error. However, even if there were, Ratliff cannot show prejudice. He, not his counsel, interrupted several times to argue with the prosecutor, but he did not object that she was speculating or trying to arouse the passions of the jurors against the homeless. 01/06/16 RP 231, 233, 234, 235, 236. In fact, the jury seems to have felt some sympathy for Ratliff. In the first of three questions submitted by the deliberating jury, it asked, "Can we use mental health as justification for his lack of awareness?" 01/06/16 RP 266.

Finally, Ratliff argues that had he objected, a curative instruction would have been useless because the picture of Ratliff as a homeless drug user could not be dislodged from the minds of the jurors. Appellant's Opening Brief at 18. It is not at all apparent why this would be so. Had the trial court sustained such an objection, a simple instruction that told them they were not to speculate about the homeless culture would have been sufficient. Jurors are presumed to follow instructions. State v. Latham, 100

Wn.2d 59, 67, 667 P.2d 56 (1983). “The jury is presumed to follow the instruction that counsel’s arguments are not evidence.” State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

Ratliff’s claim that the prosecutor committed misconduct should be denied.

3. The imposition of appellate costs is not dependent on the determination of ability to pay. However, under the facts of this case, the State will not seek appellate costs should it substantially prevail on appeal.

Ratliff asks this court not to impose appellate costs in the event the State prevails on appeal, arguing that he is indigent and will never be able to pay those costs.

Under RCW 10.73.160(1), this court “may require an adult offender convicted of an offense to pay appellate costs.” As this court has recognized, the statute gives this court discretion concerning the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant claims that because the trial court found him to be indigent, costs should presumptively be denied. This argument ignores both the language and the history of RCW 10.73.160.

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is “An Act Relating to indigent persons.” Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for “recoupment of fees for court-appointed counsel.” Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. “Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure.” “In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.” Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that “[u]nder normal circumstances, the prevailing party on appeal would recover appeal

costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn. App. 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case. It refused to award costs because “this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved.” NECA, 65 Wn.2d at 23.

In Moore, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal.” Moore, 66 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court

routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

“In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period.” In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents routine issues of prosecutorial misconduct. The defendant litigated the case for his own benefit, not for any public interest. Nothing in this case supports

permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

If this court focuses on the defendant's ability to pay, nothing in the record indicates that he is physically incapable of finding employment after his release. Ratliff has apparently avoided gainful employment all of his adult life, instead supporting himself by panhandling. 01/05/16 RP 160. "I've never dreamed of the day I couldn't panhandle five bucks." *Id.* at 177. The trial court imposed only the mandatory costs of the \$500 crime victim assessment, \$200 filing fee, and \$100 DNA fee. 02/25/16 RP 19. Ratliff's attorney told the court he had approximately \$25,000 in debt. *Id.* at 14.

However, it is crystal clear that Ratliff, regardless of his ability to pay, will never pay a dime of any costs imposed. The record in its entirety reflects a man who flatly refuses to conform to the law or societal norms in any way. At sentencing he told the court:

When I do my time on this I ain't checking in either. So it ain't no good giving me community—whatever the f*** that is, probation, whatever it is. Just bullshit. I ain't going to accept it. I just as soon do my time straight and be done with it.

02/25/16 RP 18.


The State will not waste taxpayer money repeatedly hauling Ratliff before the court in a futile effort to collect appellate costs. Should the State substantially prevail on appeal, it will not ask this court to impose the costs of appeal.

D. CONCLUSION.

The trial court did not abuse its discretion when it denied Ratliff's motion to represent himself. There was no prosecutorial misconduct in closing argument. The State will not seek appellate costs in the event it prevails on appeal. The State respectfully asks this court to affirm Ratliff's convictions.

Respectfully submitted this 27th day of September, 2016.

JON TUNHEIM
Thurston County Prosecuting Attorney



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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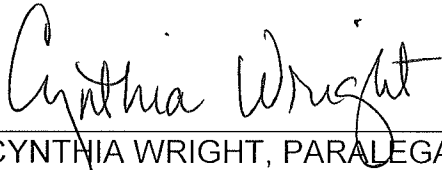
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of September, 2016, at Olympia,
Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

September 28, 2016 - 3:59 PM

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